SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 575

HELEN JACKSON, PETITIONER,

vs.

LYKES BROS. STEAMSHIP CO., INC.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

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[fol. 1]

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS STATE OF LOUISIANA

HELEN JACKSON

VS.

LYKES BROS. STEAMSHIP CO., INC.

PETITION FOR DAMAGES DUE TO TORTIOUS DEATH ($75,000.00)

The petition of Helen Jackson, surviving widow and personal representative of Luther Jackson, brings this action against Lykes Bros. Steamship Co., Inc., for the following cause to-wit:

(1) Helen Jackson is a resident of the Parish of Orleans. And she is the sole surviving wife of the aforementioned Luther Jackson, hereinafter called the decedent.

(2) Lykes Bros. Steamship Co., Inc., is a domestic corporation authorized to do and doing business in the Parish of Orleans, State of Louisiana, engaged in shipping commerce, foreign and domestic.

(3) At all times hereinafter mentioned the respondent owned, operated, manned and/or controlled a certain vessel or certain vessels, believed upon information and belief to be named the SS MALLORY LYKES and/or the SS MARGARET LYKES, which vessel(s) were allegedly involved in the accident/ailment/illness death of the decedent.

(4) On or about February 19, 1964, the decedent was employed by the defendant as a longshoreman, assigned to work on the aforementioned vessel(s), aboard the same, engaged in cargo operations when he was caused to ingest,

inhale and/or absorb fumes, chemical and/or gases which caused, initiated, contributed to, aggravated pre-existing conditions, and/or accelerated his death.

(5) On the aforementioned date the vessel or vessel(s) was/were afloat in the navigable waters of the Mississippi River at or near the Nashville Avenue Wharf.

[fol. 2] (6) As a result of the traumatic incidents sustained by the decedent on the aforementioned vessel(s) he was confined as an inpatient to Flint Goodridge Hospital where he expired on February 23, 1964.

(7) Prior to the demise of the decedent he was a strong, sturdy man of 60, capable of earning $4500.00 per year as a longshoreman. And the petitioner, herein, anticipated and expected support from the decedent for ten or more years subsequent to the demise.

(8) The aforementioned accident/ailment and/or illness, the death of the decedent and the damages of the petitioner were caused through the negligence of the defendant, their employees, agents and/or representatives in the following manner to wit:

(a) They failed to properly contain the chemical, fumes and/or gases that escaped to injure, ail and/or do harm to the decedent;

(b) They failed to keep the vessel, its gear, cargo, appurtenances, and apparel seaworthy, safe and free of defects;

(c) They failed to make timely and proper inspections of gear, cargo, containers and/or appurtenances;

(d) They failed to inspect, contain, prepare, stow cargoes properly in the vessel(s).

(9) The petitioner avers that the decedent was a member of the crew of the aforementioned vessel(s) so as to entitle the petitioner to seek remedy herein under the provisions of the Jones Act (46 U.S.C. 688);

Or in the alternative, if this Honorable Court should so hold that the decedent was not a member of the crew, then in that alternative, it is averred that the decedent was a vicarious seaman, entitling the petitioner to seek remedy herein under the provisions of General Maritime Law and/or under the Louisiana Civil Code Articles 667, 670, 2315, 2317 and 2320.

(10) In addition to those rights and remedies, herein alleged and averred under Article (9) of this petition it is also averred that the decedent was at all times an employee of the defendant so as that the petitioner is additionally entitled to seek remedy under the Longshoreman & Harbor Worker's Act (33 U.S.C.A. 901 et seq.) and the Louisiana Workmen Compensation Act (LSA-R.S. 23:1021 et seq.).

[fol. 3] (11) To interrupt prescription under the Longshoreman & Harbor Worker's Act a copy of this petition will be mailed to the office of U.S. Deputy Commissioner, 600 South Street, N.O., La.

(12) In order to affirmatively interrupt prescription under the Louisiana Workmen Compensation Act it is specifically averred that the decedent was:

(a) An employee of the defendant, earning more than $75.00 per week;

(b) Engaged in hazardous work within the meaning of the Act;

(c) And the petitioner reserves all rights and remedies granted under the provisions of LSA—R.S. 23:1021, et seq.

(13) As a result of the foregoing accident, injury, death and damages the petitioner makes claim herein for $75,000.00.

Wherefore, the petitioner prays:

(a) That process may issue in due form of law;

(b) That she be granted a trial by jury as per the provisions of the Seventh Amendment and Fourteenth Amendment of the United States Constitution;

(c) That damages be granted in the first alternative in the amount of $75,000.00 under the Jones Act;

(d) That damages be granted in the second alternative in the amount of $75,000.00 under General Maritime Law and/or under the provisions of the Louisiana Civil Code Articles 667, 670, 2315, 2317 and/or 2320 or 2322;

(e) Or that in the third alternative that there be interruption of prescription under either the federal and/or the state workmen compensation act;

(f) And for all general and equitable relief.

Charles R. Maloney, Attorney for the Petitioner, 818 Richards Bldg., New Orleans, La., 70112.

Instructions for Service:

[fol. 4]

State of Louisiana
Parish of Orleans

Before Me, the undersigned authority, personally came and appeared: Helen Jackson who, upon first by me being duly sworn, according to law, did depose and say:

That he is the petitioner in the above and foregoing petition; that he is a citizen of the Parish of Orleans, State of Louisiana; and that he is, because of poverty and lack of means, financially unable to pay court costs in this matter or to give bond or security for costs.

Helen Jackson.

Sworn to and subscribed before me this day of January 4, 1965. Charles R. Maloney, Notary Public.

State of Louisiana
Parish of Orleans

Before Me, the undersigned authority, personally came and appeared: who, upon first by me being duly sworn, according to law, did depose and say:

That he is well acquainted with who is a citizen of the State of Louisiana, and knows his financial condition; that he is unable to pay present or future costs of this suit, or to give bond thereof, because of poverty and lack of means.

James Thornton, Sr., 3040 Montford Street.

Sworn to and subscribed before me this day of January 4, 1965. Charles R. Maloney, Notary Public.

ORDER

The foregoing petition and affidavits considered, let petitioner herein, be and he is hereby authorized and permitted to prosecute this action without payment of costs, or giving bond for costs, according to the provisions of New Orleans, Louisiana, this 6th day of January, 1965.

(Name illegible), Judge.

[fol. 5]

IN THE CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

[Title omitted]

EXCEPTIONS—Filed July 8, 1965

Now Comes Lykes Bros. Steamship Co., Inc., made defendant in the above entitled and numbered cause, and, appearing herein through its undersigned counsel solely

for the purpose of making the following exceptions, excepts to the petition of Helen Jackson on the following grounds:

1. The petition fails to state a right or cause of action;

2. As to the Longshoremen's and Harbor Workers' Compensation Act Claim, this Court has no jurisdiction;

3. As to the alleged Jones Act claim, the plaintiff is not the proper party to bring the action, and has no right or cause of action;

All for the reasons set forth in the annexed memorandum which is made a part hereof.

Wherefore, defendant prays that these exceptions be maintained and that the suit of Helen Jackson be dismissed at plaintiff's cost.

Terriberry, Rault, Carroll, Yancey & Farrell, By: Francis Emmett, T.A. and By: G. Edward Merritt, T.A., Attorneys for Defendant, 825 Whitney Building, New Orleans, Louisiana.

[fol. 6] Certificate of Service (omitted in printing).

[fol. 7]

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

[Title omitted]

MEMORANDUM IN SUPPORT OF EXCEPTIONS—
Filed July 8, 1965

May It Please the Court:

Helen Jackson has filed suit for damages as the result of the death of her husband, Luther Jackson. The essence of her petition is Article IV thereof:

"On or about February 19, 1964, the decedent was employed by the defendant as a longshoreman, assigned

to work on the aforementioned vessel(s) aboard the same, engaged in cargo operations when he was caused to ingest, inhale and/or absorb fumes, chemicals and/or gasses which caused, initiated, contributed to, aggravated pre-existing conditions, and/or accelerated his death."

The petition seeks relief under (1) the Jones Act, (2) the Louisiana Workmen's Compensation Act, (3) the Longshoremen and Harbor Workers' Compensation Act, (4) the Louisiana Civil Code, (Articles 667, 670, 2315, 2317, and 2320), and (5) the General Maritime Law.

Defendant has taken the following exceptions to the petition:

1. *Jones Act Claim*: Since the petition alleges that the decedent was a longshoreman, there is no cause of action under the Jones Act which provides a remedy only for seamen who are either masters or members of the crew of a vessel, and not for longshoremen. 46 U.S.C.A. § 688; *Rhinehart* v. *T. Smith & Son, Inc.*, 14 So. 2d 287 (Orl. Par. Ct. of App., 1943); *South Chicago Coal and Dock Company* v. *Bassett*, 309 U.S. 251, 60 S. Ct. 544, 84 L. Ed. 732 (1939); *Swanson* v. *Marra Bros., Inc.*, 328 U.S. 1, 66 S. Ct. 869, 90 L. Ed. 1045 (1946).

[fol. 8] Additionally, the Jones Act requires that the action be brought by the "personal representative" of the decedent for the benefit of the named beneficiaries. The plaintiff is not a duly qualified personal representative (which is usually the administrator or executor of the decedent's estate), and hence has no right of action. 46 U.S.C.A. § 688; *Lindgren* v. *United States*, 281 U.S. 38, 50 S. Ct. 207, 74 L. Ed. 686, (1930).

2. *Louisiana Workmen's Compensation Act Claim*: Since the decedent was working as a longshoreman aboard a vessel in navigable waters when he allegedly was exposed to the asserted noxious fumes, there is no cause of action

under the Louisiana Workmen's Compensation Act. *Ellis* v. *Travelers Insurance Co.*, 241 La. 433, 129 So. 2d 729 (1961); *Stepter* v. *T. Smith & Son, Inc.*, 241 La. 465, 129 So. 2d 740 (1961).

3. *Longshoremen and Harbor Workers' Compensation Act Claim*: This Court has no jurisdiction over a claim under the Longshoremen and Harbor Workers' Act (which is plaintiff's only possible remedy, if indeed she has any). 33 U.S.C.A. § 905. *Robinson* v. *Lykes Bros. Steamship Co., Inc.*, 170 So. 2d 243, (La. App. 1964), *cert. den.*, (1965).

4. *Louisiana Civil Code Articles*: As the subject longshoreman's death allegedly resulted from his service aboard the vessel, the longshoreman and Harbor Workers' Compensation Act is the only remedy available to the exclusion of all state laws. 33 U.S.C.A. § 905, *Rhinehart* v. *T. Smith & Son, Inc., supra; Southern Pacific Company* v. *Jensen*, 244 U.S. 205, 37 S. Ct. 524, 61 L. Ed. 1086 (1917).

5. *General Maritime Law Claim*: There is no cause of action for wrongful death under the General Maritime Law. *The Harrisburg*, 119 U.S. 199, 7 S. Ct. 140, 30 L. Ed. 358, (1886); *Cortes* v. *Baltimore Insular Line, Inc.*, 287 U.S. 367, 53 S. Ct. 173, 77 L. Ed. 368 (1933). *The Tungus* v. *Skovgaard*, 358 U.S. 588, 79 S. Ct. 503, 3 L. Ed. 2d 524 (1959).

[fol. 9] For the foregoing reasons, it is respectfully submitted that the plaintiff's petition must be dismissed at her cost.

Terriberry, Rault, Carroll, Yancey & Farrell, By: Francis Emmett and By: G. Edward Merritt, 825 Whitney Building, New Orleans, Louisiana 70130, Attorneys for Defendant-Exceptor.

[fol. 10]

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

No. 431-099

Division "H"

Docket 4

HELEN JACKSON

vs.

LYKES BROS. STEAMSHIP CO., INC.

JUDGMENT—October 1, 1965

The exceptions herein filed on July 8, 1965, by Lykes Bros. Steamship Co., Inc., came on this day for hearing.

Present: Charles R. Maloney, attorney for plaintiff. G. Edward Merritt, attorney for exceptor.

When, after hearing the pleadings, and argument of counsel, and for the reasons orally assigned:

It Is Ordered that the exceptions of no right or cause of action; jurisdiction; and that plaintiff is not the proper party to bring the action; and has no right or cause of action, be and the same are hereby maintained, and plaintiff's suit be dismissed, at plaintiff's costs.

Judgment Read, Rendered and Signed in Open Court on October 1st, 1965.

Oliver P. Carriere, Judge.

[fol. 11]

IN THE COURT OF APPEAL

FOURTH CIRCUIT

STATE OF LOUISIANA

No. 2155

HELEN JACKSON

v.

LYKES BROS. STEAMSHIP CO., INC.

Appeal From the Civil District Court for the Parish of Orleans, Division "A", No. 431-099, Hon. Oliver P. Carriere, Judge.

* * *

OPINION—April 4, 1966

Godfrey Z. Regan, Judge.

* * *

(Court composed of Judges Godfrey Z. Regan, Louis H. Yarrut, and Luther E. Hall.)

[fol. 12] The plaintiff, Helen Jackson, filed this suit against the defendant, Lykes Bros. Steamship Company, Inc., endeavoring to recover the sum of $75,000.00 representing damages incurred by her as a result of the death of her husband from the inhalation of noxious gases, which she asserts was caused by the negligence of the defendant or the unseaworthiness of its steamship, upon which her husband was employed as a longshoreman.

The plaintiff requests relief under the Jones Act,[1] the Louisiana Workmen's Compensation Act,[2] the Longshore-

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[1] 46 U.S.C. § 688.

[2] R.S. 23:1021, et seq.

men's and Harbor Workers' Compensation Act,[3] the Louisiana Civil Code,[4] and the general maritime law.

The defendant in response to the foregoing suit pleaded the exceptions of no right or cause of action predicated on the rationale (1) that the Jones Act provides a remedy only for seamen who are either masters or members of the [fol. 13] crew, and not for longshoremen; that (2) the Louisiana Workmen's Compensation Act does not apply to a longshoreman injured or killed aboard a vessel in navigable waters; that (3) since the Longshoremen's and Harbor Workers' Act provides the exclusive remedy in this situation, the plaintiff possessed no cause of action under the Louisiana Civil Code; and that (4) there exists no cause of action for wrongful death under the general maritime law.

In addition thereto, the defendant filed an exception to the jurisdiction of the court rationae materiae insisting that the Louisiana courts possess no jurisdiction under the Longshoremen's and Harbor Workers' Compensation Act.

From a judgment of the lower court sustaining all of the defendant's exceptions and dismissing the plaintiff's suit, she has prosecuted this appeal.

The record reveals that the plaintiff asserted in her petition that her husband was killed as the result of the inhalation of noxious fumes or gases while in the course and scope of his employment as a longshoreman aboard the defendant's steamship. The ship was moored in the Mississippi River when the accident occurred, so that there exists no dispute as to the fact that he was working aboard in navigable waters.

Therefore, the only question posed for this court's consideration is whether the plaintiff's exclusive remedy emanates from the Longshoremen's and Harbor Workers' Act, or whether she may litigate in the state courts under

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[3] 33 U.S.C. § 901.

[4] Arts. 667, 670, 2315, 2317, 2320, 2322.

the Jones Act, the general maritime law, the Louisiana Civil Code, or the Louisiana Workmen's Compensation [fol. 14] Act.

The answer to the foregoing question is contained in 33 U.S.C. § 905, which provides that the Longshoremen's and Harbor Workers' Act is the exclusive remedy where it is applicable. This section reads:

> "The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such *employer to the employee,* his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death. . . . "

Since the injury complained of was sustained by a longshoreman aboard a vessel located in navigable waters, the Longshoremen's Act is applicable to the exclusion of any remedies for wrongful death afforded by the Louisiana Civil Code.[5]

In view of the exclusiveness of the remedy under the Longshoremen's and Harbor Workers' Act, it has been settled that this act and the Louisiana Workmen's Compensation Act are mutually exclusive. However, situations have often arisen wherein it was difficult, if not impossible, to determine whether a particular injury was within the purview of the Louisiana Workmen's Compensation Act or the Longshoremen's and Harbor Workers' Act. In order to ease the burden on a compensation claimant in making his choice of remedies, the courts carved out an exception known as the "twilight zone" doctrine by virtue of which the injured party possessed a choice of either the federal [fol. 15] or state compensation remedy when the location of the accident could reasonably have conferred jurisdiction upon the state courts or the federal administrative agencies. However, in this case it is clear that the long-

[5] 33 U.S.C. § 903.

shoreman involved was fatally injured while working on navigable waters, and the above statute emphatically reveals that the Longshoremen's and Harbor Workers' Act is applicable to the facts hereof.[6]

The plaintiff's argument as to the applicability of the Jones Act and the general maritime law to the death of her husband is predicated primarily upon the rationale emanating from the case of Reed v. Steamship Yaka,[7] which concluded that the section of the Longshoremen's and Harbor Workers' Act quoted above making that act the exclusive remedy of a longshoreman injured aboard a vessel in navigable waters did not preclude an action by an employee against his employer for injuries sustained aboard a vessel owned by the employer. This case involved a suit under the general maritime law, predicated upon the shipowner's warranty of a seaworthy vessel.

The plaintiff argues, in effect, that the Yaka decision emasculated and rendered of no effect the exclusive remedy provision of the Longshoremen's and Harbor Workers' Act. Thus counsel for plaintiff reasons that since this section is no longer in force, a person injured as a longshoreman employed by a shipowner may pursue his remedy under the Jones Act.

[fol. 16] Our analysis of the Yaka case, however, does not support the plaintiff's contention. It is authority only for the proposition that an injured longshoreman may bring an admiralty libel under the general maritime law for injuries sustained by him aboard his employer's vessel. It does not afford a longshoreman Jones Act coverage.[8]

Finally, the plaintiff insists that she has a right to proceed against the defendant under the general maritime law.

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[6] Stepter v. T. Smith & Son, Inc., 241 La. 465, 129 So. 2d 740 (1961); Ellis v. Travelers Insurance Co., 241 La. 433, 129 So. 2d 729 (1961).

[7] 373 U. S. 410, 83 Sup. Ct. 1349 (1963).

[8] See Aycock v. Lykes Brothers Steamship Co., Inc., 236 F. Supp. 360 (D. C. Tex. 1964).

The general maritime law does not, as a rule, provide a cause of action for wrongful death.[9] However, in certain cases the Admiralty Court will look to the wrongful death statute of the state in which it sits and apply that statute to the facts posed by the particular case.

In any event, the plaintiff contends that the rationale emanating from the case of Reed v. Yaka[10] affords a remedy directly, or in personam, against the defendant for the death of her husband. In response to this argument, the defendant points to Robinson v. Lykes Brothers Steamship Co., Inc.,[11] wherein this court concluded that the exclusive remedy provision of the Longshoremen's and Harbor Workers' Act precludes an in personam action against the employer. In that case this court construed the Yaka decision as permitting merely an in rem action against the vessel owned by the employer. Counsel for the defendant asserts that such an interpretation preserves the integrity of the Longshoremen's and Harbor Workers' Act remedy and [fol. 17] also lends the proper effect to the ratio of the Yaka case.

An analysis of the Yaka case reveals language[12] which suggests that an in personam remedy may be available; the analysis likewise reveals that there exists reason for believing that the section of the Longshoremen's and Harbor Workers' Act referred to hereinabove has been taken upon the judicial anvil and hammered into an unexpected shape.

In any event, we are of the opinion that it exemplifies more judicial integrity to conclude that the rationale ema-

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[9] Cortes v. Baltimore Insular Line, Inc., 287 U. S. 367 (1932).

[10] Supra.

[11] 170 So. 2d 243 (1964).

[12] "We find it unnecessary to decide whether a ship may ever be held liable for its unseaworthiness where no personal liability could be asserted because, in our view, the Court of Appeals erred in holding that Pan-Atlantic could not be held personally liable for the unseaworthiness of the ship which caused petitioner's injury."

nating from Yaka merely permits a longshoreman to bring an action in rem against his employer in the federal court.

For the foregoing reasons, the judgment of the lower court is affirmed.

The plaintiff is to pay all costs of this proceeding.

Affirmed

[fol. 18]

IN THE COURT OF APPEAL FOR THE FOURTH CIRCUIT

STATE OF LOUISIANA

[Title omitted]

APPLICATION FOR RE-HEARING—Filed April 15, 1966

The petition of Helen Jackson, plaintiff and appellant in the above entitled and numbered cause, respectfully represents that the judgment of this Honorable Court rendered on April 4, 1966, affirming the judgment of the Civil District Court for the Parish of Orleans, Division "H", which sustained an exception of no right or cause of action and dismissed plaintiff's suit, is erroneous and contrary to law and is prejudicial to plaintiff for the following reasons:

1.

The Court is in error in holding that as a matter of law the petitioner is precluded from asserting any claim under the Jones Act (46 U.S.C. 688) as a matter of law.

2.

The Court is in error in ignoring the provisions of 33 U.S.C. 903, which reads:

> Section 3. (a) Compensation shall be payable under this Act in respect of disability or death of an em-

[File endorsement omitted]

ployee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) *and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law.* No compensation shall be payable in respect of the disability or death of—

(1) A master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net; or

. . . . .

Denied May 2, 1966

[fol. 19]

3.

And after ignoring 33 U.S.C. 903, the Court is in error in assuming that 33 U.S.C. 905, as a matter of law declares the decedent, herein, *not to be* a member of the crew.

4.

And assuming the rationale of the Court with reference to the applicability of 33 U.S.C. 905 the Court remains in error in affirming the judgment that precludes a determination on the facts as to whether or not the decedent was a member of the crew and instead assumes as a matter of law that the decedent was not.

5.

The Court errs in holding that the plaintiff has no right or cause of action *in personam* against the defendant under *Reed* v. *Yaka,* and is restricted to a sole remedy under the Longshoremen's and Harbor Workers' Compensation Act.

The Court, herein, followed the erroneous reason of the U. S. Court of Appeals for the Third Circuit in *Reed* v. *Yaka,* 307 Fed. (2d) 203 (1962). The Court erred in adhering to the rationale of the Third Circuit, the Court, herein, ignored the U. S. Supreme Court, which reversed the same Third Circuit, stating:

"We find it unnecessary to decide whether a ship may ever be held liable for its unseaworthiness where no personal liability could be asserted because, in our view, the *Court of Appeals erred in holding that Pan-Atlantic could not be held personally liable for the unseaworthiness of the ship which caused petitioner's injury.*" 83 Sup. Ct. 1349, 1351. (Emphasis added.)

If any further evidence were necessary to show that the Supreme Court held that the employer was personally liable and the Longshoremen's and Harbor Workers' Act was not a bar to recovery under general maritime law, it is found in the following words from *Reed* v. *Yaka*:

"We have no doubt, and indeed Pan-Atlantic admits, that, barring explicit statutory exemption, the bareboat charterer is *personally liable* for the seaworthiness of a chartered vessel, and that this liability will support a libel *in rem* against the vessel. Since the unseaworthiness of the *Yaka* is no longer in dispute, the only question is whether the Longshoreman's Act prevents recovery for Pan-Atlantic's breach of its warranty of seaworthiness." 373, U. S. 410, 413.

6.

The defendant, Lykes Bros. Steamship Company, Inc., has urged and the Court below and this Court has seized upon the footnote *obiter dicta* in *Guzman* v. *Tichirilo*, 369 U.S. 698, 1962, in an attempt to avoid the consequences of *Reed* v. *Yaka*. An examination of the *Guzman* case reveals that it is not in point, but on the contrary, with merely one in a series of cases that lead up to the holding in *Reed* v. *Yaka*. As per *Reed* v. *Yaka* (See 373 U.S. 410, 411) the shipowner is personally liable for the injury or death of a longshoreman, even though the longshoreman be a direct employee of the shipowner.

[fol. 20]

7.

Counsel for the petitioner does not argue that the *Yaka* decision emasculated and rendered of no effect the exclusive remedy features of the Longshoreman's and Harbor Workers' Act, such that this section is no longer in force. Instead, it is the position of the plaintiff that whether or not a seaman is a member of the crew is a question of fact for the jury to decide; whether or not a seaman is an employee within the meaning of the Longshoreman's and Harbor Workers' Act is a question of fact for the United States Deputy Commissioner to decide; whether or not a seaman is an employee within the meaning of the Louisiana Workmen's Compensation Act is a question of fact for a Louisiana District Court Judge to decide; after submission of evidence.

8.

Plaintiff avers that the Court is in error in following the decision of *Robinson* v. *Lykes Bros. Steamship Co., Inc.*, 170 So. 2d 243 (1964); that the same is erroneous as a representation that the *Yaka* decision restricts the remedy of a seaman to an in rem action against the vessel.

9.

The Court is in error in suggesting that the *Yaka* case only reveals language which suggests that an *in personam* remedy may be available against the shipowner, when on the contrary, in no uncertain words, throughout the holding of this case, the U. S. Supreme Court has explicitly stated that an in personam remedy is available to a seaman, even though he be a longshoreman, against the shipowner.

10.

Wherefore, petitioner prays that a re-hearing be granted in this cause and that after due proceedings had the judgment rendered herein on April 4, 1966, be set aside and re-

versed, and that there be judgment herein remanding the case for trial.

Charles R. Maloney, Attorney for plaintiff-appellant, 816 Richards Building, New Orleans, Louisiana 70112, Telephone: 522-9039.

Certificate of Counsel (omitted in printing).

[fol. 21]

IN THE SUPREME COURT

STATE OF LOUISIANA

No. .....

HELEN JACKSON

VS.

LYKES BROS. STEAMSHIP CO., INC.

PETITION FOR WRIT OF CERTIORARI TO REVIEW THE DECISION OF THE COURT OF APPEAL, FOURTH CIRCUIT, STATE OF LOUISIANA

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the State of Louisiana:

This petition for a writ of certiorari to review the decision of the Court of Appeal for the Fourth Circuit is filed on behalf of Helen Jackson, plaintiff and appellant herein, who respectfully shows:

I

Statement of the Case

Luther Jackson, the decedent, was subjected to the fumes and vapors of an insecticide that escaped in the hold of a

vessel while the decedent was employed as a longshoreman aboard a vessel owned by the respondent. The inhalation of fumes, vapors and/or oxygen deficient air caused, contributed to the death of the decedent.

The surviving widow of the decedent brought suit against the respondent pursuant to the Jones Act (46 USC 688) or in the alternative pursuant to General Maritime Law and/or Louisiana Civil Code Articles 667, 670, 2315, 2317 and 2320. Or in the alternative to the foregoing pursuant to the Louisiana Workmen's Compensation Act (LSA-R.S. 23:1021, et seq.)

On July 6, 1965 Lykes Bros. Steamship Company, Inc. filed Exceptions of No Cause or Right of Action, claiming that the Longshoreman's and Harbor Workers' Act provided exclusive remedy, citing 33 U.S.C.A. 905.

On October 1, 1965, the exceptions were tried in the Civil District Court for the Parish of Orleans, Division "H", Judge Oliver P. Carriere presiding, and the exception of no cause of action was maintained.

On April 4, 1966, the Court of Appeal for the Parish of Orleans affirmed the judgment of the Civil District Court.

On May 2, 1966, an application for re-hearing was refused by the Court of Appeal. No written reasons were assigned for this refusal.

[fol. 22]

II

Questions of Law Involved

The questions of law, herein involved are:

(a) Whether or not the holding of *Reed* v. *Yaka*, 373 US 410 (1963) by the United States Supreme Court is binding on a state court forum, as it is in a federal court forum;

(b) Whether or not in the absence of any type of administrative award or procedure to determine the status of the decedent, the court can as a matter of law assume that the exclusive clause in the Longshoreman's and Harbor

Workers' Act (33 USC 902) automatically excludes the decedent from being a member of the crew;

(c) Whether or not a state court forum can, with or without (and in this case without) evidence conclude that the petitioner's remedy comes exclusively within the purview of the Longshoreman's and Harbor Workers' Act;

(d) Whether a state forum, unlike a federal forum, can assume as a matter of law that the decedent was not a member of the crew precluding remedy to the petitioner pursuant to the Jones Act 46 USC 688;

(e) Whether or not the provisions of LSA-R.S. 23:1037 are automatically unconstitutional, even though respondent has failed to urge motion or argument to that effect.

III

Assignment of Errors

1. The Court of Appeal erred in holding, contrary and in opposition to the decision of the Supreme Court of the United States in *Reed* v. *Yaka,* 373 U.S. 410 (1963), that a longshoreman does not have a cause of action *in personam* against the shipowner for injuries due to the unseaworthiness of the vessel.

2. The Court of Appeal erred in holding that there could be *in rem* liability without *in personam* liability.

3. The Court of Appeal erred in applying the holding of *Ellis* v. *Travelers Insurance Co.,* 241 La. 433, 129 So. (2d) 729 (1961), as authority for barring a longshoreman from seeking damages against a shipowner for injuries due to an unseaworthy vessel.

4. The Court of Appeals erroneously assumed that the issue presented herein was identical with that presented in *Ellis* v. *Travelers Ins. Co.,* 241 La. 433, 129 So. 2d 729 (1961).

5. The Court of Appeals erroneously assumed that the exclusion clause in the Longshoreman's and Harbor Workers Act (33 USC 902) rules out a longshoreman from being a member of the crew.

[fol. 23] 6. The Court of Appeals first correctly stated that Civil District Court for the Parish of Orleans had no jurisdiction, whatsoever, to ascertain whether or not the petitioner was entitled to remedy pursuant to the Longshoreman's and Harbor Workers' Act, but in spite of this restriction decided that the petitioner's "exclusive" remedy was pursuant to the Federal Workmen's Compensation Act.

7. The Court of Appeals assumed that as a matter of law the decedent could not be a member of the crew.

8. The Court of Appeals assumed that the provisions of LSA-R.S. 23:1037 were unconstitutional, even though no motion or argument, whatsoever, was urged by the respondent to that effect.

9. The Court of Appeals erroneously assumed that the factual problem herein, was identical with that presented in *Robinson* v. *Lykes Bros. Steamship Co., Inc.,* 170 So. 2d 243 (La. App 1964) cert den (1965), and thereafter applied the erroneous holding of the Robinson case herein.

10. The Court of Appeals assumed erroneously that as a matter of law the petitioner had no right of action for the death of her husband.

IV

Argument on Assignment of Error No. 1

In *Reed* v. *Yaka,* 373 U.S. 410 (1963), the United States Supreme Court explicitly held that a longshoreman could seek remedy against a shipowner, pursuant to General Maritime Law, for the breach of the warranty of seaworthiness, notwithstanding that the shipowner was the direct employer of the longshoreman. In rendering this decision

the United States Supreme Court abandoned the literal reading of 33 U.S.C. 905 and refused to apply the "exclusiveness of remedy" clause in favor of that shipowner who chose to act simultaneously as a shipowner and stevedore.

Lykes Bros. Steamship Co., Inc. is a shipowner typically identified in *Reed* v. *Yaka, supra,* acting simultaneously as shipowner and as stevedore. The members of the crew are employed directly by Lykes Bros. Steamship Co., Inc. and the longshoremen are employed directly by Lykes Bros. Steamship Co., Inc.

Thus, the decision of *Reed* v. *Yaka* is pointed directly to shipowners such as the defendant:

> "... that a shipowner's obligation of seaworthiness cannot be shifted about, limited, or escaped by contracts or by the absence of contracts and that the shipowner's obligation is rooted, not in contracts, but in the hazards of the work ... In the light of this whole body of law, statutory and decisional, only blind adherence to the superficial meaning of a statute could prompt us to ignore the fact that Pan Atlantic was not only an employer of the longshoreman but was also a bareboat charterer and operator of a ship and, as such, was charged with the traditional, absolute, and nondelegable obligation of seaworthiness which it should not be permitted to avoid." 83 Sup. Ct. 1353.

[fol. 24] The defendant, Lykes Bros. Steamship Co., Inc., alleges that *Reed* v. *Yaka* relieves them of personal liability. However, the United States Supreme Court under the same set of facts stated that there was personal liability, as follows:

> "... We find it unnecessary to decide whether a ship may ever be held liable for its unseaworthiness where no personal liability could be asserted because, in our view, the Court of Appeals erred in holding that Pan

Atlantic could not be held personally liable for the unseaworthiness of the ship which caused petitioner's injury." 83 Sup. Ct. 1351.

The United States Supreme Court pointed out further that the species of liability represented by a breach of the warranty of seaworthiness was "humanitarian" in nature:

". . . In *Seas Shipping Co.* v. *Sieracki,* 328 U.S. 85 (1946), we held that a shipowner's warranty of seaworthiness extends to longshoremen . . . In doing so, we noted particularly the hazards of marine service, the helplessness of the men to ward off the perils of unseaworthiness, the harshness of forcing them to shoulder their losses alone, and the broad range of the *'humanitarian policy'* of the doctrine of seaworthiness." 83 Sup. Ct. 1352. (Emphasis ours.)

Somehow in the shuffle of the instant case the "humanitarian policy" has been lost.

It should be noted that *Reed* v. *Yaka* is not the first assault of the Supreme Court on the exclusiveness provisions of the LHWA (33 U.S.C.A. 905). As pointed out by the Court in the *Reed* case:

"Ten years later (after *Sieracki*), in *Ryan Stevedoring Co.* v. *Pan Atlantic S.S. Corp.,* 350 U.S. 124 (1956), we were faced with the question of whether a shipowner who was forced to pay damages to a longshoreman injured . . . could recover indemnity from the stevedoring company for whom the longshoreman worked . . . the Court held that the stevedoring company was liable over to the shipowner . . . The Court was not convinced by arguments that its result made the economic burden of the longshoreman's recovery fall on the stevedoring employer contrary to the purpose of the Act." 83 Sup. Ct. 1352.

And further explaining its position, which comes pointed on all fours to the instant case, the Court had this to state:

> "Thus there can be no doubt that, if the petitioner here had been employed to do this particular work by an independent stevedoring company rather than directly by the owner, he could have recovered damages for his injury from the owner who could have then under *Ryan* shifted the burden of the recovery to petitioner's stevedoring employer." 83 Sup. Ct. 1352.

[fol. 25] None of ~~the~~ foregoing from *Reed* v. *Yaka* was explained, quoted, qualified or distinguished by the Court below. We submit *Reed* v. *Yaka* is squarely in point with the instant case, representing authority that the instant petitioner has a valid cause of action against Lykes Bros. Steamship Co., Inc., as further witness note the following statement of the United States Supreme Court:

> "Yet the Court of Appeals held, and Pan Atlantic would have us hold, that petitioner must be completely denied the traditional and basic protection of the warranty of seaworthiness simply because Pan Atlantic was not only the owner pro hac vice of the ship but also petitioner's employer. In making this argument, Pan Atlantic has not and could not point to any economic difference between giving relief in this case, where the owner acted as his own stevedore, and in one in which the owner hires an independent company." 83 Sup. Ct. 1352.

Substitute Lykes Bros. Steamship Co., Inc. for Pan Atlantic for the foregoing quotation, and we have the instant case. There is no distinction.

Nevertheless since the Court of Appeals, in the instant case, referred to the literal meaning of 33 U.S.C.A. 905, we should refer back to *Reed* v. *Yaka, supra,* and examine what the United States Supreme Court stated:

"Pan Atlantic relies simply on the literal wording of the statute, and it must be admitted that the statute on its face lends support to the Pan Atlantic construction. But we cannot now consider the wording of the statute alone. We must view it in the light of our prior cases in this area, like *Sieracki*, *Ryan* and others, the holdings of which have been left unchanged by Congress. In particular, we pointed out several times in the *Sieracki* case, which has been consistently followed since, that a shipowner's obligation of seaworthiness cannot be shifted about, limited or escape by contracts or by the absence of contracts, and that the shipowner's obligation is rooted, not in contracts, but in the hazards of the work." 83 Sup. Ct. 1353.

Moreover, the history of cases decided by the United States Supreme Court does not support a literal interpretation of the statute.*

[fol. 26]

V

Argument on Assignment of Error No. 2

The Supreme Court of the United States stated in *Guzman* v. *Pichirilo*, 369 U.S. 698 (1962), that there could *be*

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* *Seas Shipping Co.* v. *Sieracki*, 328 U.S. 85 (1946) extended the doctrine of seaworthiness to longshoremen, even though the longshoreman was not a member of the crew, and in spite of the fact that the longshoreman was entitled to compensation benefits under the Longshoreman's and Harbor Workers' Act. *Ryan Stevedoring Co.* v. *Pan Atlantic S.S. Co.*, 350 U.S. 124 (1956) recognized the shipowner's right of action against the stevedoring company, for the negligence of the stevedoring company, claiming indemnity over, in spite of the fact that the stevedoring company was statutorily liable for compensation benefits to the same injured longshoreman. Also see *Pope & Talbot, Inc.* v. *Hawn*, 346 U. S. 406 (1953); *Alaska S.S. Co.* v. *Peterson*, 347 U.S. 984 (1954); *Crumady* v. *The Joachim Hendrik Fisser*, 358 U.S. 423 (1959); *Meyerhaeuser S.S. Co.* v. *Nacierema Operating Co.*, 355 U.S. 563 (1958); and *Waterman S.S. Corp.* v. *Dugan & McNamara, Inc.*, 364 U.S. 421 (1960).

no in rem liability without in personam liability. The Court below reversed this and held there could be *in rem* liability without *in personam* liability. See Opinion of Court below.

We submit that there can never be an action against a thing without some underlying action against a person for damages. On this score, we have a decision of the Supreme Court of the United States to back us up, and we are certainly willing to rely on that authority.

VI

Argument on Assignment of Error No. 3

The case of *Ellis* v. *Travelers Insurance Co.*, 241 La. 433, 129 So. (2d) 729 (1961), relied on by both courts below, is not applicable to the instant case. The *Ellis* case, *supra*, involved the conflicts of the "twlight zone," i.e., whether the Louisiana Workmen's Compensation Act applied exclusively and/or concurrently to the injury of a longshoreman sustained aboard a vessel over navigable waters. This is not a "twlight zone" case.

VII

Argument on Assignment of Error No. 4

The Courts below relied on *Ellis* v. *Travelers Insurance Co.*, 241 La. 433, 129 So. 2d 729 (1961) and *Stepter* v. *T. Smith & Sons, Inc.*, 241 La. 465, 129 So. 2d 740 (1961) as authority that the petitioner has no claim under the Workmen's Compensation Act for the State of Louisiana. In doing so, the Courts below ignored these distinguishing features that are contrary in the instant case:

(a) In the *Ellis* and *Stepter* case, unlike the instant case, the employer of the longshoreman was not a shipowner;

(b) In the *Ellis* and *Stepter* case, the longshoreman could not make claim against the shipowner under the Jones Act, 46 USC 688, because there was no

direct employee/employer relationship between the shipowner and longshoreman;

(c) The shipowner in the *Ellis* and *Stepter* cases were foreign non-domestic companies; and in the *Ellis* and *Stepter* cases the shipowners were not involved in the issues;

(d) In the instant case the shipowner is a named defendant, employing the longshoreman direct;

(e) In the instant case the shipowner is a Louisiana domiciled corporation, which corporation specifically comes within the purview of the Louisiana Courts;

[fol. 27] (f) In the instant case there is a direct employee-/employer relationship between the longshoreman and the shipowner;

(g) In the *Stepter* and *Ellis* cases compensation benefits to the longshoremen were not denied under the Federal Act; instead, they were conceded;

(h) Traumatic or moving forces were involved in the *Ellis* and *Stepter* injuries which clearly placed the injuries within the purview of the Federal Act; but in the instant case there is question as to whether or not the ailment of the decedent comes within the purview of the Federal Act.

In view of the foregoing points of disparity between the *Stepter* and *Ellis* cases with the instant case, it is strange that the respondent or the Court below would even mention the same. At the least, these prior cases cannot stand for law in this instant case.

VIII

Argument on Assignment of Error No. 5

The Court of Appeals failed to take cognizance of the fact that a longshoreman is a seaman. *Seas Shipping Co.*

v. *Sieracki* (1946) 328 US 85, is not the first instance that the United States Supreme Court declared that longshoremen were entitled to be assimilated to the seaman's remedy of damages for personal injuries arising from the shipowner's failure to furnish a seaworthy vessel. A longshoreman injured in the case of *International Stevedore Co.* v. *Haverty* (1926) 272 US 50. In this case (Haverty), the longshoreman, was not only declared to be a seaman but was declared to be a seaman/member of the crew, coming within the purview of the Jones Act.

It was no accident that "Haverty" was declared to be a member of the crew, eligible to seek remedy pursuant to the Jones Act. "Haverty" was one of those few longshoremen employed *direct* by the shipowner. "Haverty", like "Yaka" and like the instant "Luther Jackson" were all employed directly by the shipowner. In this respect they meet the test of being eligible to seek remedy pursuant to the Jones Act. And contrary, in spite of and in opposition to the Court of Appeals misquote of the petitioner/appellant's argument below it is not the contention herein that the "Longshoreman's and Harbor Workers' Act has been emasculated". The overwhelming majority of longshoremen are *not* employed direct by shipowners, and if they are *not* employed direct by the shipowner they are precluded from seeking remedy from the shipowner pursuant to the Jones Act.

Of course, the case of Haverty did not offer remedy for most longshoremen, since the greater number of longshoremen, unlike Haverty and the instant decedent (Jackson), worked for independent contractors who are not shipowners. Since stevedores or stevedoring companies are rarely shipowners, the case of Haverty offered no remedy to the regular longshoremen. Thus, the longshoreman's and Harbor Workers' Act was enacted to give remedy to those longshoremen who were not eligible to make claim against their employers pursuant to Jones Act.

[fol. 28] The Longshoreman's and Harbor Workers' Act was not enacted to take away or restrict rights and reme-

dies of longshoremen. The Federal Act was enacted to give rights and remedies to longshoremen, since in 1927, the great mass of longshoremen were denied remedy under State Workmen's Compensations acts and were generally denied rights under the Jones Act. The *Haverty* case only afforded remedy for those longshoremen who could qualify as direct employees of the shipowners. Since most longshoremen worked for stevedores and not shipowners, the aforementioned *Haverty* case was little or no relief to longshoremen at large. (Of course, the decedent, herein, qualified pursuant to the aforementioned Haverty case.)

The aforementioned Longshoreman's and Harbor Workers' Act (33 USC 901, et seq.) does not deny the members of the crew rights afforded under the Jones Act (46 USC 688). Instead, the exclusion (33 USC 902) applies as follows:

> "The term 'employee' does not include any master or member of the crew of any vessel, nor any person engaged by the master to load or unload or repair any vessel under eighteen tons net"

The Longshoreman's and Harbor Workers' Act excludes members of crews from the purview of the act. If the longshoreman is a member of the crew, then he is excluded from the Federal Workmen's Compensation Act. *However, that is not identical with stating that a longshoreman has no right of remedy under the Jones Act.*

The holding of the Court of Appeals in the instant case is to the effect that a longshoreman as a matter of law is precluded from remedy under the Jones Act. The Jones Act, 46 U.S.C. 688, will not support such a view.

IX

Argument on Assignment of Error No. 6

The Court below first stated correctly that it had no jurisdiction to ascertain whether or not the petitioner was entitled to remedy pursuant to the Longshoreman's and

Harbor Workers' Act, but then the Court ignored this limitation by alleging that the petitioner's remedy was "exclusively" confined to the provision of the Longshoreman's and Harbor Workers' Act.

The Longshoreman's and Harbor Workers' Act specifically provides that the term "employee" as applied pursuant to the act, "does not include any master or member of the crew". See 33 USC 903.

Whether or not the decedent was an "employee" within the meaning of the Longshoreman's and Harbor Workers' Act is a matter for the determination of the United States Deputy Commissioner of the Department of Labor, 33 USC 919. And if he had a determination and if there had been no timely appeal, then the determination by the U. S. Deputy Commissioner would serve as conclusive evidence as to whether or not the decedent was an "employee" within the meaning of the act (or conversely is not a member of the crew) *Desper* v. *Starved Rock Ferry Company,* (1952) 342 US 187, 72 S Ct. 216.

[fol. 29] But the United States Deputy Commissioner has made no determination, whatsoever, with reference to whether or not the decedent was an "employee" within the meaning of the act.

The State Court do not possess jurisdiction to ascertain whether or not the decedent was an employee within the meaning of the Federal Act.

X

Argument on Assignment of Error No. 7

The Court below ignored the law, plainly and persistently, stated by the United States Supreme Court to the effect that whether or not an employee is a member of the crew, entitled to remedy under the Jones Act, is a question of fact to be tried by the jury. This is basic, but the Court below ignored the same. Whether one injured aboard a vessel is a seaman and entitled to the Jones Act remedy is a *question of fact* which must be determined by the trier

of the facts, 46 USC 688; *Desper* v. *Starved Rock Ferry Company* (1952) 342 US 187, 72 S Ct. 216; And when a case is to be tried by a jury, as the instant case, it is a question of fact for the jury to determine. The determination of whether the decedent was a seaman should not be taken from the jury by the trial judge if there is any evidentiary basis for the jury to determine. *Grimes* v. *Raymond Concrete Pile Company,* (1957) 356 US 252, 78 S Ct. 687. *Gianfala* v. *Texas Co.,* 350 US 879 (1955); *Senko* v. *LaCrosse Dredging Corp.,* 352 US 370 (1957) rehearing denied, 353 US 931 (1957); *Braniff* v. *Jackson Ave. Gretna Ferry, Inc.,* 280 F. 2d 523, (CA 5th 1960); *Offshore Company* v. *Robinson,* 266 F 2d 769 (CA 5th 1959); *Butler* v. *Whitman,* (1957) 356 US 271, 78 S Ct. 734; *McKie* v. *Diamond Marine Co.,* 204 F 2d 132 (CA 5th 1953).

XI

Argument on Assignment of Error No. 8

Since the instant defendant is a Louisiana domiciled corporation, the petitioner has herein made specific claim against the respondent pursuant to the provisions of LSA —R.S. 23: 1037, which pertinent part reads:

> "... but nothing in this Chapter shall be construed to apply to any work done on, nor shall any compensation be payable to the master, officers or members of the crew of, any vessel used in interstate or foreign commerce not registered or enrolled in the State of Louisiana." (Emphasis ours).

In all prior proceedings no evidence, whatsoever, was introduced to indicate that the vessels involved were not registered or enrolled in Louisiana or that Lykes Bros. Steamship Co., Inc. was not a domestic, Louisiana corporation. Moreover, no argument, whatsoever, was introduced or urged that the foregoing quoted section of this statute was unconstitutional. Apparently, the Court below

operated on a pre-conceived notion that the same was unconstitutional.

[fol. 30] In the light of the quoted provisions the legislature of the State of Louisiana has heretofore enacted special provision to cover under the Louisiana Workmen's Compensation Act those employees of shipowners, when those shipowners are domiciled in this state and enroll and register their vessels in this state.

This is a statute enacted by the legislature for the State of Louisiana. It should be given presumptive validity as opposed to pre-conceived unconstitutionality.

Since the respondent did not offer any evidence to the contrary, or even challenge argument in the least it must be assumed as a matter of fact for this particular case that Lykes Bros. Steamship Co., Inc. is a Louisiana corporation and the vessels involved are registered and enrolled in the State of Louisiana. Accordingly, pursuant to the specific provision (as quoted) of the state statute, the petitioner should be entitled to remedy herein under this statute.

The particular provisions of this statute have not been revoked. It is submitted the Court below should presume its validity, and not pre-conceived its non-constitutionality.

XII

Argument on Assignment of Error No. 9

The facts of the instant case do not represent the facts of *Robinson* v. *Lykes Bros. Co., Inc.*, 170 So. 2d 243 (La. App. 1964), Cert. Den. (1965). The defendant shipowner is the same and the Court and division where originally filed is the same. However, there are the following differences:

(a) A traumatic injury was involved in the Robinson case;

(b) Compensation pursuant to the federal act was voluntarily paid by the respondent in the Robinson case;

(c) The United States Deputy Commissioner for the federal act made an administrative determination of Robinson's status under the act;

(d) Robinson voluntarily conceded that his employment came within the purview of the federal act;

(e) The issue as to whether or not Robinson was a member of the crew, entitled to remedy under the Jones Act, 46 U.S.C. 688, was abandoned by Robinson;

(f) The Robinson case involved the sole issue as to whether or not the longshoreman could make claim against the shipowner in State Court, as he can in Federal Court, pursuant to *Reed* v. *Yaka,* 373 US 410 (1963).

The facts and the issue of the *Robinson* case does not parallel the instant case. This is a different case. [fol. 31] And notwithstanding the foregoing, the petitioner avers that the holding in *Robinson* v. *Lykes Bros. Steamship Co., Inc.,* supra, in erroneous. The decision in the *Robinson* case was rendered contrary and in spite of the case *Reed* v. *Yaka,* 373 US 410 (1963). *Reed* v. *Yaka,* supra is the law. This is the law as designated by the United States Supreme Court. *Robinson* is out of harmony with the expression of the United States Supreme Court.

XIII

Argument on Assignment of Error No. 10

The Jones Act, 46 USC 688, as supplemented by the Federal Employee's Liability Act (FELA), 45 USC 51-59, affords the petitioner a right of action for the death of her husband. And even, assuming that the petitioner is denied a right of action under the Jones Act she has a right of action pursuant to the Louisiana Civil Code Article, 2315. Assuming she has no right of action under the Jones Act, the petitioner has a right, via use of the local (state)

statute for wrongful death and survivorship on the basis of negligence and unseaworthiness. See *Tungus* v. *Skovgaard,* 358 US 588 (1959); Also see *United N. Y. and N. J. Sandy Hook Pilots Assn.* v. *Halecki,* 358 US 613 (1959); *Hess* v. *United States,* 361 US 314 (1960) and *Goett* v. *Union Carbide Corp.,* 361 US 340 (1960).

XIV

Petitioner annexes hereto the following documents:

(a) A copy of the petition and exceptions and answer filed in the Court of original jurisdiction;

(b) A copy of the opinion rendered by the Court of Appeal;

(c) A copy of the application for rehearing, and petitioner declares that rehearing was refused on May 2, 1966;

(d) Copies of all briefs filed in the Court of Appeal.

Wherefore, the premises considered, petitioner prays that a writ of certiorari be issued herein directing this Honorable, the Judges of the Court of Appeal, Fourth Circuit, State of Louisiana, to send up to Your Honors the entire record in the case aforesaid to the end that the same may be examined and the judgment reversed and the case remanded to the District Court for trial on the merits.

Petitioner further prays for all general and equitable relief, and for all such further orders of the Court as may be just, equitable, legal and permissible under the circumstances.

Charles R. Maloney, Attorney for the petitioner, 816 Richards Building, New Orleans, Louisiana 70112, Telephone: 522-9039.

[fol. 32] Certificate of Counsel (omitted in printing).

[fol. 33]

IN THE SUPREME COURT OF LOUISIANA

[Title omitted]

ORDER REFUSING WRIT OF CERTIORARI—June 21, 1966

Writ refused. We find no error of law in the judgment of the Court of Appeal.

WBH, JBF, JBH, FWH, FHMcC.

Sanders, J., and Summers, J., are of the opinion that a writ should be granted. See Robinson v. Lykes Bros., 247 La. 481, 172 So. 2d. 292.

A True Copy, Clerk's Office, Supreme Court of Louisiana, New Orleans, June 21, 1966.

Harold A. Moise, Jr., Deputy Clerk.

[fol. 34] Clerk's Certificate (omitted in printing).

[fol. 35]

SUPREME COURT OF THE UNITED STATES

No. .....—October Term, 1966

HELEN JACKSON, Petitioner,

vs.

LYKES BROS. STEAMSHIP CO., INC.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon Consideration of the application of counsel for petitioner,

It Is Ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including October 17th, 1966.

Hugo L. Black, Associate Justice of the Supreme Court of the United States.

Dated this 16th day of September, 1966.

[fol. 36] SUPREME COURT OF THE UNITED STATES

No. 575—October Term, 1966

HELEN JACKSON, Petitioner,

vs.

LYKES BROS. STEAMSHIP CO., INC.

ORDER ALLOWING CERTIORARI—December 5, 1966

The petition herein for a writ of certiorari to the Supreme Court of the State of Louisiana is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.